Chua Su Yin & Co v Ng Sung Yee & Anor and other appeals

HIGH COURT (JOHORE BARU) — CIVIL APPEAL NOS 11-37, 11-38, 11-39, 11-40, 11-41, 11-48, 11-49 AND 11-50 OF 1988
ABU MANSOR J
3 APRIL 1990

Evidence — Privilege — Solicitor and client — Solicitor acting for housing developer — Solicitor receiving in capacity of stakeholder retention moneys from purchasers — Garnishee proceedings against solicitor regarding moneys — Whether solicitor may claim privilege in answering garnishee proceedings — Whether communications regarding moneys privileged from disclosure — Evidence Act 1950, s 126

Legal Profession — Solicitor and client — Privilege — Solicitor acting for housing developer — Solicitor receiving in capacity of stakeholder retention moneys from purchasers — Garnishee proceedings against solicitor regarding moneys — Whether solicitor may claim privilege in answering garnishee proceedings — Whether communications regarding moneys privileged from disclosure — Evidence Act 1950, s 126

The appellant was a solicitor for a company which was a housing developer. Pursuant to the Housing Developers (Control and Licensing) Regulations 1982, the company had deposited with the appellant as stakeholder retention money equivalent to 5% of the purchase price of properties received from purchasers for the purpose of making good any defect arising within the defect liability period of 12 months. Certain judgment creditors of the company brought garnishee proceedings in the magistrate's court in respect of these moneys. The appellant's preliminary objection that she was not in a position to say whether in fact there was or there was no money belonging to the company was overruled. The appellant appealed. The only question in the appeals was whether a client's money held in trust by a solicitor in his client account could be an appropriate subject of garnishee proceedings in view of the provisions of s 126 of the Evidence Act 1950 which relates to the privilege accorded to communications between a solicitor and his client.

Held, dismissing the appeal:

(1) The appellant was solicitor for the company. The persons who made the payments, ie the purchasers, were not the agents or clients of the appellant. There was an absence of communication or any relationship between the appellant and the purchasers. The privileged communication, if any, that the appellant was required to protect, was the communication of her client, the company, to her.

(2) In the present case, the communication was one which the purchasers would want to be made public and on the face of it should and ought to be published as suppressing it would result in no proof that the purchasers had paid the moneys and of how much they had paid.

[Bahasa Malaysia summary

Perayu adalah seorang peguamcara untuk sebuah syarikat pemaju perumahan. Mengikut Peraturan Pemaju Perumahan (Kawalan dan Perlesenan) 1982, syarikat itu telah menyimpan dengan perayu, sebagai pemegang wang taruhan, wang tahanan bersamaan dengan 5% harga belian rumah yang telah diterima daripada pembeli bagi tujuan memperbaiki apa-apa kecacatan yang berbangkit dalam tempoh masa tanggungan kecacatan selama 12 bulan. Beberapa pemiutang penghakiman syarikat itu memulakan prosiding garnisi di mahkamah majistret berkenaan wang itu. Bantahan permulaan perayu bahawa beliau tidak berada dalam kedudukan untuk berkata sama ada sesungguhnya terdapat atau tidak wang kepunyaan syarikat itu telah ditolak. Perayu membuat rayuan. Soalan tunggal dalam rayuan ialah sama ada wang klien yang dipegang dalam amanah oleh seorang peguamcara dalam akaun kliennya boleh menjadi subjek berpatutan bagi prosiding garnisi memandangkan peruntukan s 126 Akta Keterangan 1950 yang berkenaan dengan keistimewaan yang diberikan kepada hubungan antara seorang peguamcara dan kliennya.

Diputuskan, menolak rayuan itu:

(1) Perayu adalah peguamcara bagi syarikat itu. Orang-orang yang membuat bayaran, iaitu pembeli, bukan ejen atau klien perayu. Tidak terdapat komunikasi atau sebarang perhubungan antara perayu dan pembeli. Keistimewaan komunikasi, jika ada, yang wajib dipertahankan oleh perayu, ialah komunikasi kliennya, syarikat itu, kepadanya.

(2) Dalam kes ini, komunikasi itu adalah satu yang pembeli-pembeli itu ingin dijadikan pengetahuan awam, dan pada permukaannya harus dan patut diterbitkan kerana menindasnya akan membawa kesan tidak ada bukti bahawa pembeli-pembeli telah membayar wang dan jumlah yang telah dibayar.]

Legislation referred to
Evidence Act 1950 s 126
Housing Developers (Control and Licensing) Regulations 1982

Lee Buck Heng for the appellant in Civil Appeal Nos 11-37 to 11-41 of 1988 and Civil Appeal Nos 11-48 to 11-50 of 1988.

David Ng for the respondents in Civil Appeal Nos 11-37 to 11-41 of 1988.

CS Tam for the respondents in Civil Appeal Nos 11-48 to 11-50 of 1988.

Cur Adv Vult

Abu Mansor J: In these appeals Mr Lee Buck Heng appears for the appellant in Civil Appeal Nos 37 to 41 of 1988 and Mr David Ng appears for the respondents. In CA No 48 of 1988 to CA No 50 of 1988 Mr Tam is for the respondents. At the outset of arguments Mr Lee informed the court the many appeals raise only one issue and he said parties have agreed that the court only deal with CA No 48 of 1988 and the decision in CA No 48 of 1988 will bind all parties. This was confirmed by Mr Ng and Mr Tam for the respondents in the respective civil suits.

The only question coming for decision of this court is whether a client's money held in trust by a solicitor in his client's account can be an appropriate subject of garnishee proceedings in view of the provision of s 126 of the Evidence Act 1950.

The facts that led to the dispute are these. Yondazgreen, the developer, was sued by the respondent for late delivery of the houses built. The court entered judgment against the company Yondazgreen for the sum of $14,343.34 on 11 April 1988 in the case of 82-72 of 1987 with interest at 8% pa from 2 July 1987 till realization and costs at $350. The appellant was so-

licitor for this company. The sum subject matter of judgment is the sum sought to be garnished by the respondent in this appeal.

Under the Housing Developers (Control and Licensing) Regulations 1982 it is incumbent for a housing developer to retain a solicitor to act to receive the final payment of 5% of the purchase price from the purchaser as a stakeholder. The sum so retained is for making good any defect within the defect liability period of 12 months. The first 2½% to be released after six months and the next 2½% after 12 months in the event there is no claim.

It is common ground that what the respondent was seeking to garnish was this retention money, if any, held. In the magistrate's court below a garnishee order to show cause was taken out and served on the appellant asking the appellant to show cause why if any money is with the respondent that money should not be garnished. At the hearing below the appellant raised a preliminary objection contending that she was not in a position to say whether in fact there was or there was no money belonging to the judgment debtor (the company) held by her in view of s 126 of the Evidence Act 1950. The objection was overruled. These appeals are against the decision of the learned magistrate.

Mr Lee then addressed the court on the provisions of s 126 of the Evidence Act 1950. Mr Tam correctly pointed out to court that what the court had to decide and what the parties had agreed to submit for a decision was not a question of law of principles of privileged communication. What the court had to answer specifically and more subjectively was as to the true position of the money held by a solicitor as a stakeholder and in the present case all the garnishee need to answer is: is there or is there no money due or payable to the judgment debtor, the developer company.

The court was in agreement that the question to be decided must be confined to the four corners of the appeal. I, however, cannot agree if in our attempt to answer the problem we omitted to look at s 126 of the Evidence Act 1950 as forming the basis of the objection of Mr Lee's client. Section 126 of the Evidence Act 1950 reads (I quote in full):

> (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure —
>
> (a) any such communication made in furtherance of any illegal purpose;
>
> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.
>
> (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.
>
> Explanation — The obligation stated in this section continues after the employment has ceased.
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> Illustrations
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> (a) A, a client, says to B, an advocate: 'I have committed forgery and I wish you to defend me.'
>
> As the defence of a man known to be guilty is not a criminal purpose this communication is protected from disclosure.
>
> (b) A, a client, says to B, an advocate: 'I wish to obtain possession of property by the use of a forged deed on which I request you to sue.'
>
> This communication being made in furtherance of a criminal purpose is not protected from disclosure.
>
> (c) A, being charged with embezzlement, retains B, an advocate, to defend him. In the course of the proceedings B observes that an entry has been made in A's account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.
>
> This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

On one's reading of s 126 of the Evidence Act 1950 it would appear the evidence the section seeks to protect is the breach of matters told in confidence by a client to his legal adviser — provided that such communication is not made in furtherance of any illegal purpose or showing a crime has indeed been committed which robs it of protection, such communication is protected and can never be divulged, lest no one will repose any confidence in his legal adviser and will result in the drying up of such communication.

At a glance, before s 126 communication can apply there must be a prerequisite of client and solicitor (advisor) relationship and any disclosure, if it is to take place, must be with the absolute consent of the client.

In the present poser before us, the facts are the money sought to be garnished had been paid by the individual purchasers to the solicitor garnishee as stakeholder. In whose employment at that material time was the solicitor garnishee? It is clear he was acting for the vendor, who under the present usual arrangement is also the developer company. The persons who made the payment, the purchasers, are not the agent or client of the garnishee solicitors who had been engaged by the developers under the Housing Developers (Control and Licensing) Regulations. I am of the view, as submitted by counsel for the respondent, that there is absence of communication or any relationship between the solici-

tor garnishee and purchasers. The privileged communication the solicitor garnishee is required to protect if any, is the communication of his client, the developer, to him. In our present context the communication is from a person not really his client. I find it is not a class of communication which the law was designed to protect. In my view it is communication which the purchaser would want to be made public and on the face of it should and ought to be published as suppressing it would result in no proof that the purchasers had paid and how much. Unfortunately for the solicitor garnishee by disclosing it, it would work to the detriment of his client but nonetheless it must be disclosed for the benefit of purchasers who had made those payments which must be accounted for. I agree with the argument of Mr Ng for the respondents that there is no secrecy to be protected.

For reasons I gave I find there is no merit in this appeal and I hereby dismiss it with costs to be taxed. As agreed by the parties this order of mine will bind the other related appeals. I order that the other appeals be also dismissed with costs.

Appeals dismissed.

Solicitors: *Abdullah A Rahman & Co; Lim & Hooi; CK Tam & Co.*

Reported by *PS Ranjan*

Pembinaan Maluri Sdn Bhd lwn Prudential Assurance Sdn Bhd

MAHKAMAH TINGGI (KUALA LUMPUR) — SAMAN PERMULAAN NO S6-31-3125-88
ABDUL RAZAK H
29 OKTOBER 1990

Kontrak — Jaminan pelaksanaan — Adakah plaintif berhak dibayar oleh defendan di bawah satu jaminan pelaksanaan yang diberi oleh defendan kepadanya — Tafsiran jaminan tersebut — Sama ada bersyarat — Perlukah notis diberi kepada defendan jika pindaan dibuat kepada kontrak asal — Had masa untuk menuntut di bawah jaminan — Adakah bercanggah dengan Akta Kontrak 1950

Plaintif memohon pengisytiharan bahawa ia berhak dibayar sejumlah $280,000 di bawah satu jaminan pelaksanaan yang diberi okeh defendan. Perkara ini adalah ekoran dari suatu kontrak kecil yang dibuat di antara sebuah syarikat bernama Israf Construction Sdn Bhd dengan plaintif di mana salah suatu syarat ialah Israf akan memberi jaminan sebanyak $280,000 dari mana-mana badan kewangan bahawa ia akan melaksanakan projek itu dengan sempurna. Pihak defendan telah memberi jaminan itu. Plaintif mengatakan Syarikat Israf telah gagal melaksanakan kerja-kerjanya dan tuntutan dibuat terhadap defendan untuk wang yang dijaminnya tetapi defendan enggan membayar. Oleh itu, plaintif telah membatalkan perjanjiannya dengan Israf dan mengambil tindakan di sini terhadap defendan.

Diputuskan, menolak permohonan plaintif:

(1) Plaintif telah gagal memberi notis kepada defendan apabila beberapa pindaan kepada perjanjian antaranya dengan Israf dibuat, iaitu mengurangkan bilangan rumah-rumah yang hendak dibina. Bagaimanapun, soal sama ada notis itu perlu diberi atau tidak, tidak berbangkit kerana jaminan itu cuma mensyaratkan bahawa notis itu hendaklah diberi apabila sesuatu pindaan itu dilakukan.

(2) Jaminan itu juga memperuntukkan bahawa sebelum defendan boleh didakwa, hendaklah ada satu tuntutan tidak lebih daripada enam bulan selepas kontrak kecil antara plaintif dan Israf itu tamat. Tarikh tamatnya kontrak kecil ialah tarikh kerja-kerja di bawah perjanjian itu seharusnya siap, iaitu 25 Julai 1987 seperti dinyatakan dalam kontrak kecil itu sendiri. Enam bulan selepas tarikh itu jatuh pada 25 Januari 1988 tetapi plaintif telah membuat tuntutan cuma pada 13 Jun 1988.

(3) Jaminan itu juga menyatakan bahawa segala tuntutan hendaklah dibuat sebelum jaminan itu luput pada 14 April 1988. Fasal 1 jaminan itu tidak ada percanggahan dengan Akta Kontrak 1950, yang menyatakan bahawa tiap-tiap perjanjian yang menghadkan hak seseorang itu membuat tindakan mahkamah adalah tidak sah, kerana ianya tidak menghadkan hak plaintif membuat sesuatu tindakan mahkamah di dalam masa-masa yang ditetapkan di bawah Akta Had Masa 1953. Fasal itu cuma menyatakan bahawa tiap-tiap tindakan itu hendaklah didahului, terlebih dahulu, dengan suatu tuntutan dibuat. Maknanya, tanpa tuntutan itu, adalah dianggapkan bahawa pihak yang tergugat telah menggugurkan haknya. Tidak ada undang-undang yang mengatakan jika mana-mana pihak bersetuju menggugurkan haknya, ini adalah melanggar undang-undang.

(4) Jaminan ini adalah suatu jaminan yang bersyarat yang belum dipatuhi oleh plaintif kerana:

(i) ia menyatakan bahawa ia merupakan tambahan sahaja kepada kontrak kecil antara Israf dan plaintif, bermakna, pada dasarnya, jaminan itu belum boleh berbangkit selagi kontrak itu belum dipatuhi;

(ii) jaminan itu menyatakan, antara lainnya, bahawa ia tertakluk kepada syarat bahawa pihak kontraktor telah melanggar kontrak tersebut. Maka soalan ialah, adakah kontrak itu telah dilanggar dan soalan ini tidak dapat diputuskan dengan plaintif sahaja menyatakan bahawa kontrak itu telah dilanggar, melainkan jika perjanjian itu dengan sendirinya berkata bahawa pendapat plaintif sedemikian adalah muktamad.

[English summary

The plaintiff applied for a declaration that it is entitled to paid a sum of $280,000 under a performance bond given by the defendant. This matter resulted from a sub-contract made between a company known as Israf Construction Sdn Bhd with the plaintiff wherein a condition of the contract is that Israf shall procure a bond of $280,000 from any financial institution that it can carry out the said project completely. The defendant gave the said bond. The plaintiff averred that Israf failed to carry out its work and a claim was made against the defendant for the sum guaranteed by it but the defendant refused to pay. Therefore, the plaintiff terminated its agreement with Israf and took this action against the defendant.

Held, dismissing the plaintiff's application:

(1) The plaintiff failed to give notice to the defendant when there were amendments made to its contract with Israf, that is, to reduce the number of houses to be built. In any